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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0492**

Deborah Artishon,
Appellant,

vs.

Estate of Mavis Corrine Swedberg,
Respondent,

Christopher Middlebrook as Personal Representative,
Defendant,

Liberty Mutual Group,
Respondent,

St. Paul Guardian Insurance Company,
Respondent.

**Filed April 21, 2009
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-07-15390

David R. Cox, P. O. Box 1881, St. Paul, MN 55101 (for appellant)

Shari L. Lowden, Law Offices of Bakken, Robinson & Grove, 701 Xenia Avenue South,
Suite 220, Golden Valley, MN 55416 (for respondents Estate of Mavis Corrine Swedberg
and Liberty Mutual Group)

Randall E. Gottschalk, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., 500 Young
Quinlan Building, 81 South Ninth Street, Minneapolis, MN 55402 (for respondent St.
Paul Guardian Insurance Company)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondents, arguing that (1) the appointment of the personal representative was proper and service on the personal representative was within the statute-of-limitations period, and (2) service on respondent insurers was effective because appellant complied with the requirements of Minn. Stat. § 45.028 (2008) before the statute of limitations ran. We affirm.

FACTS

On or about January 17, 2001, appellant Deborah Artishon was struck by a vehicle driven by Mavis Corrine Swedberg. In February 2001, Artishon filed a claim for no-fault benefits with Swedberg's insurance company, respondent Liberty Mutual Group, a foreign corporation authorized to conduct business in the State of Minnesota. On May 28, 2002, Liberty Mutual denied Artishon's claim, indicating that their investigation concluded that Artishon was living with her mother at the time of the accident and she should seek coverage through her mother's insurance company, respondent St. Paul Guardian Insurance Company. On August 9, 2002, MetLife Auto & Home—a successor in interest to St. Paul Guardian, also a foreign corporation authorized to conduct business in Minnesota, determined that Artishon was not a resident of the named insured's household on the date of the incident.

On August 5, 2005, Swedberg passed away. On January 12, 2007, Artishon's attorney, David Cox, petitioned for formal appointment of a special administrator for respondent Estate of Mavis Corrine Swedberg. Cox stated that the "names and addresses of [Swedberg's] spouse, children, . . . and other persons interested in this proceeding so far as known or ascertainable with reasonable diligence by [Cox] are unknown." Cox further stated: "Upon investigation, the matter has not been filed in Probate in Hennepin County, and [Swedberg's] husband preceded her in death. Identities of any other relatives are unknown." And that: "It is unknown whether [Swedberg] died testate or intestate." Further: "By information and belief, no personal representative has been appointed." Cox petitioned for appointment of his friend, defendant Christopher Middlebrook, as special administrator of the estate. On January 16, 2007, the probate court appointed Middlebrook to act as special administrator of the estate with the power only to receive service process and tender the defense to the insurer of decedent.

On January 16, 2007, Artishon served Middlebrook as personal representative of the estate and the Commissioner of Commerce. Artishon alleged that Swedberg was negligent and that respondent insurers wrongfully refused to pay her benefits. Respondents moved for summary judgment, arguing that they were not properly served with process before the statute of limitations had expired. The estate and Liberty Mutual had an affidavit from Swedberg's daughter, Debra Seemann, who was appointed the administrator of the estate by election in Swedberg's will. Seemann indicated that she did not retain the services of Middlebrook to act as personal representative of the estate and she was not served with the lawsuit. On September 24, 2007, Artishon served St.

Paul Guardian by certified mail at an address in St. Paul, MN; Liberty Mutual by certified mail at an address in Boston, MA; and MetLife by certified mail at an address in Tampa, FL.

Following a hearing, the district court concluded that the appointment of Middlebrook as personal representative was improper, and that respondents were not properly served prior to the expiration of the statute of limitations. This appeal follows.

D E C I S I O N

The district court granted summary judgment in favor of respondents. On appeal from summary judgment, this court reviews two determinations: whether a genuine issue of material fact exists, and whether an error occurred in the application of the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). This court reviews the evidence in the light most favorable to the nonmoving party without deferring to the district court's application of the law. *Id.* “[S]ummary judgment is proper when the nonmoving party fails to provide the court with specific indications that there is a genuine issue of fact.” *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). No genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc., v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The estate

Artishon argues that Middlebrook was properly appointed as the estate's personal representative and was properly served with process within the six-year statute of limitations.

In Minnesota, a civil action is commenced against each defendant:

- (a) when the summons is served upon that defendant,
- or
- (b) at the date of acknowledgement of service if service is made by mail, or
- (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Minn. R. Civ. P. 3.01. If the defendant dies prior to the commencement of a lawsuit, the claim against the deceased individual abates. *Zahler v. Manning*, 295 N.W.2d 511, 513 n.2 (Minn. 1980). A claim against a decedent may then be brought against the personal representative of the decedent's estate. Minn. Stat. § 573 .01 (2008); *see also* Minn. Stat. § 524.3-104 (2008) (stating no proceeding to enforce a claim against an estate may be commenced before the appointment of a personal representative). A personal representative is someone who is qualified to serve in that capacity and accepts appointment by the court. *See* Minn. Stat. § 524.3-601 (2008) (stating before receiving letters, the personal representative must qualify with the appointing court). "By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested

person.” Minn. Stat. § 524.3-602 (2008). “Having the capacity to be sued, the personal representative becomes the proper defendant for claims against a decedent’s estate.” *Van Slooten v. Estate of Schneider-Janzen*, 623 N.W.2d 269, 271 (Minn. App. 2001)

Artishon’s attorney petitioned for the appointment of Middlebrook as personal representative of the estate. In the petition, Cox stated that “[t]he names and addresses of [Swedberg’s] spouse, children, heirs, devisees and other persons interested in this proceeding so far as known or ascertainable with reasonable diligence by [Cox] are unknown.” During the summary judgment hearing, the estate’s attorney stated that when she was retained as counsel, she immediately located Swedberg’s obituary, which was published in the Star Tribune. The second line of the obituary states that Swedberg is survived by children, including “Debbie Seemann & husband, David.” The estate’s attorney stated that after she read Debbie Seemann’s name, she did an online white-pages search and found her phone number and address and contacted her.

Swedberg’s will nominated Seemann as the estate’s personal representative. Seemann followed the rules of informally proceeding with closing the estate. *See* Minn. Stat. §§ 524.3-301 to .3-311 (2008) (informal probate and appointment proceedings). As the personal representative, Seemann became the proper defendant for claims against the estate and she did not retain the services of Middlebrook to act as the estate’s personal representative. The district court found that Middlebrook is a personal friend of Cox and has no apparent ties to Swedberg, Seemann, or the estate. The district court concluded that Artishon provided no evidence that she inquired whether Swedberg had any heirs who may have been more qualified to serve as personal representative of the estate, and

that Artishon and her attorney only contacted the probate court to inquire whether a personal representative had been appointed to the estate, but did not search death records or obituaries to determine whether Swedberg had any heirs or had left a will. In addition, the district court found that the appointment of Middlebrook was improper due, in part, to Artishon's attorney's failure to act with reasonable diligence in ascertaining the existence of any interested parties to the estate. Service was ineffectual because Middlebrook's appointment as personal representative was improper and deemed void, and Seemann was not served with process. Because the estate was not properly served prior to the tolling of the statute of limitations, the district court properly granted summary judgment in favor of the estate.

Insurers

Artishon argues that the insurers were properly served because she followed the statutory requirements for effective service. The insurers are foreign companies conducting business in the state of Minnesota. Under Minn. Stat. § 60A.19, subd. 3 (2008), the Commissioner of Commerce of the state of Minnesota is an authorized agent for acceptance of service of process for nonresident or foreign insurance companies that conduct business within the state. *See also* Minn. Stat. § 60A.02, subd. 2 (2008) (defining "Commissioner" to mean the Commissioner of Commerce). "The service of process authorized by this section shall be made in compliance with section 45.028, subdivision 2." Minn. Stat. § 60A.19, subd. 4 (2008).

Service of process under this section may be made by leaving a copy of the process in the office of the commissioner, or by sending a copy of the process to the

commissioner by certified mail, and is not effective unless: (1) the plaintiff, who may be the commissioner in an action or proceeding instituted by the commissioner, sends notice of the service and a copy of the process by certified mail to the defendant or respondent at the last known address; and (2) the plaintiff's affidavit of compliance is filed in the action or proceeding on or before the return day of the process, if any, or within further time as the court allows.

Minn. Stat. § 45.028, subd. 2 (2008). Thus, service of process is not effective unless, (1) the commissioner receives a copy of the process, (2) the plaintiff sends notice of the service and a copy of the process to the defendant's last known address, and (3) the plaintiff files an affidavit of compliance with the court. In other words, there are three requirements in order for service of process to be effective. Statutes controlling substituted service are to be literally construed and plaintiffs must strictly comply with them. *Wood v. Martin*, 328 N.W.2d 723, 726 (Minn. 1983); *see also Cenaiko Prods., Inc. v. Am. Alliance Ins. Co.*, No. C2-93-2185 (Minn. App. Apr. 5, 1994) (holding that service of process is ineffective under Minn. Stat. § 45.028 unless all three requirements are satisfied).

Artishon served the commissioner on January 16, 2007, the eve before the expiration of the statute of limitations. But Artishon did not fulfill the final requirements of the statute until September 24, 2007. Artishon argues that there is no requirement that "steps 2 and 3" must be complete before the commissioner is served. But the statute states that service of process is *not effective unless* all three requirements have been satisfied. There is no dispute that the final requirements were not met until September

24, 2007, after the statute of limitations had expired, on January 17, 2007. Therefore, the district court properly granted summary judgment in favor of the insurers.

Affirmed.